

# Indiana Board of Special Education Appeals



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## BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

**In the Matter of M.B.,** )  
**Hamilton Southeastern Schools, and** )  
**Hamilton-Boone-Madison Special** )  
**Services** )

**ART. 7 HEARING NO. HR 270-2008**

**Appeal from the Decision of:** )  
**James A. Jacobs, Ph.D.** )  
**Independent Hearing Officer** )

**Status: Closed to Public**

### COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

#### **Procedural History<sup>1</sup>**

A request for a due process hearing was initiated by the Student<sup>2</sup> in a letter dated June 11, 2008, and was received by the Indiana Department of Education, Division of Exceptional Learners, on June 12, 2008. James A. Jacobs, Ph.D., was appointed as the Independent Hearing Officer (IHO) on June 12, 2008, with August 26, 2008 as the original date for a final written decision. On June 12, 2008, the IHO received a Notice of Appearance from Andrew A. Manna, Esq., on behalf of the School.<sup>3</sup> The parents were proceeding *pro se*.

On June 18, 2008, the IHO provided notice of a telephonic pre-hearing conference scheduled for June 23, 2008. On June 19, 2008, Dorene J. Philpot, Esq., entered her appearance on behalf of the Student. The initial pre-hearing conference was conducted on June 23, 2008. Both parties were represented by counsel. The Student's initial Request for Hearing contained a single identifiable issue: a request for full-day kindergarten. The Student's attorney attempted to introduce numerous additional issues. The School objected to the addition of any new, unspecified and unwritten issues without having been provided adequate time in which to prepare a response. The IHO ordered the Student to submit an amended Request for Hearing including all anticipated issues. The parties cancelled a previously scheduled resolution session and agreed to reschedule the resolution session after the Student filed the amended Request for a Due Process Hearing.

<sup>1</sup> The Procedural History is taken substantially from the Independent Hearing Officer's final written decision. Neither party objected to the IHO's recitation of the procedural history. Corrections and additions have been made where warranted.

<sup>2</sup> "Student" shall refer to the Petitioner or Petitioner's parent, depending upon the context.

<sup>3</sup> "School" shall refer collectively to the local school corporation and the special education cooperative.

The timeline for issuing the decision in this matter was recalculated based upon the amended request for hearing, with the decision to be rendered by September 6, 2008. A pre-hearing order was issued on June 27, 2008, and a second pre-hearing conference was scheduled for July 7, 2008.

The Student filed his amended request for a due process hearing on June 23, 2008. Multiple issues were added that were not identified in the Student's initial request for hearing. A resolution session was conducted on July 1, 2008. The School requested, and was granted, an extension of time in order to file an answer to the Student's amended request for hearing.

A second telephonic pre-hearing conference was conducted on July 7, 2008. The School filed its answer to the amended request for due process hearing on July 7, 2008.

Sixteen issues were identified for hearing as follows:

1. Does the Student require a full-time summer school program in order to receive a free and appropriate public education (FAPE)?
2. Did the Student require extended school year (ESY) services for the summer of 2008, and if so, did the School fail to provide such services?
3. Were all required participants in attendance at a case conference (CCC) meeting held on April 30, 2008?
4. Were all required participants in attendance at a CCC meeting held on May 29, 2008?
5. Did the School fail to identify the Student as a Student with a disability in October of 2007, or at any time subsequent to this date?
6. Has the School provided the Student with appropriate special education or related services since October, 2007?
7. As a result of any failure of the School to provide the Student any required special education or related services, is the Student entitled to compensatory services, and if so what compensatory services?
8. Did the School fail to provide the Parents a copy of an individualized education plan (IEP) developed at the May 29, 2008, CCC meeting within ten (10) days?
9. Did the School fail to provide the Student with prior written notice of the School's denial to evaluate the Student?
10. Did the School fail to provide the Student with prior written notice of the School's denial to determine the Student to be eligible for special education services?
11. Did the School fail to provide the Student with prior written notice of the School's denial to determine the Student to be eligible for related services, including speech therapy?
12. Did the School fail to provide the Student with prior notice of the School's denial to determine the Student to be eligible ESY services?
13. Due to the actions or inactions of the School, are the Student's parents entitled to reimbursement for the cost of private ESY services for the summer of 2008?
14. Did the School fail to provide the Student with prior written notice of denial to determine the Student to be eligible for a full-day kindergarten program?
15. Has the School failed to devise an appropriate IEP for the Student?
16. As a result of the actions or inactions of the School, has the Student been denied a free appropriate education (FAPE)?

The hearing was scheduled for August 18 and 19, 2008. A third date, August 20, 2008, was held in reserve should another day of hearing be required. Multiple subpoenas were requested by the parties and issued by the IHO.

The School requested an extension of time of thirty (30) days on July 15, 2008. The Student did not object. The IHO granted the School's request for an extension of time such that the date by which this matter was to be heard and the IHO's decision rendered was established as October 6, 2008.

On July 21, 2008, the Student requested multiple changes and modifications be made to the previously identified issues, requesting that issues 1, 5, 9, 10, 11 and 12 be reworded. The School indicated it was prepared to go forward with the hearing with either the original issues, or the issues as modified. On August 2, 2008, the IHO granted the Student's request for revision of the issues. The sixteen (16) issues previously identified were revised, as requested by the Student, as follows:

1. Does the Student require a full-time school program in order to receive a free and appropriate public education (FAPE)?<sup>4</sup>
2. Did the Student require extended school year (ESY) services for the summer of 2008, and if so, did the School fail to provide such services?
3. Were all required participants in attendance at a case conference (CCC) meeting held on April 30, 2008?
4. Were all required participants in attendance at a CCC meeting held on May 29, 2008?
5. Did the School fail to timely identify the Student as a Student with a disability in October of 2007, or at any time subsequent to this date?
6. Has the School provided the Student with appropriate special education or related services since October, 2007?
7. As a result of any failure of the School to provide the Student any required special education or related services, is the Student entitled to compensatory services, and if so what compensatory services?
8. Did the School fail to provide the Student's parents a copy of an individualized education plan (IEP) developed at the May 29, 2008, CCC meeting within ten (10) days?
9. Did the School fail to provide the Student with prior written notice of the School's denial to timely evaluate the Student?
10. Did the School fail to provide the Student with prior written notice of the School's denial to timely determine the Student to be eligible for special education services?
11. Did the School fail to provide the Student with prior written notice of the School's denial to timely determine the Student to be eligible for related services, including speech therapy?
12. Did the School fail to provide the Student with prior notice of the School's denial to timely determine the Student to be eligible ESY services?
13. Due to the actions or inactions of the School, are the Student's parents entitled to reimbursement for the cost of private ESY services for the summer of 2008?
14. Did the School fail to provide the Student with prior written notice of denial to determine the Student to be eligible for a full-day kindergarten program?
15. Has the School failed to devise an appropriate IEP for the Student?

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<sup>4</sup> The IHO's procedural history stated this issue as "Does the Student require a full-time summer school program in order to receive a free and appropriate public education (FAPE)?" However, the IHO's order dated August 2, 2008, granting the Student's request to modify the issue deleted the word "summer" from this issue.

16. As a result of the actions or inactions of the School, has the Student been denied a free and appropriate education (FAPE)?

On August 7, 2008, the School notified the IHO of a discovery dispute wherein the School alleged the Student had not provided the School with all documents in possession of the Student. The IHO conducted a telephonic pre-hearing conference on August 8, 2008, and ordered the Student to provide the School with any and all documents not previously provided to the School within twenty-four (24) hours.

The hearing was held on August 18, 19, 20, and 29, 2008. A pre-hearing conference was held before the start of the hearing wherein documents and exhibits were reviewed. Multiple difficulties arose. Documents presented by Petitioners failed to contain page numbers in several instances. In other instances page numbers on Petitioner's documents did not agree with page numbers on documents provided to the IHO. Illegible page numbers were entered on multiple pages. Documents not previously provided the IHO, or the School, were presented. The IHO ruled that any information contained in any document provided to the School subsequent to the CCC meetings of April 30, 2008, and May 29, 2008, were not relevant to the decisions made by the CCC at those two meetings. The issue of whose page numbers were the correct page numbers persisted throughout the hearing to some degree, finally being settled upon by edict from the hearing officer on the final day of hearing. The discrepancy of page numbers, while awkward, did not encumber either party's ability to efficiently present their case or the hearing officer's ability to render a decision in this matter.

Objections to the exhibits were made by both parties. The Student's documents and exhibits, pages one through 499, minus page 227 were admitted. A compact disc, which both parties stipulated to be an accurate recording of the April 30, 2008, and May 29, 2008, CCC meetings was admitted. The School's documents, pages one through 809 were admitted. As with the Student's documents, a compact disc recording of the April 30, 2008, and May 29, 2008, CCC meetings was admitted.

During the hearing it was determined an additional day of testimony would be required, which was scheduled for August 29, 2009. The School requested that the hearing decision deadline be extended from October 6 to October 13, 2008. The School's motion for a seven day extension of time was granted. At the request of the School, a transcript of Dr. Bryan Hudson's testimony of August 18, 2008, was completed and provided to the parties on or about August 25, 2008.

A pre-hearing conference was held on August 22, 2008, to address several administrative matters. The IHO requested that the audiologist's report regarding the Student's hearing acuity be confirmed as reflecting hearing acuity as measured with or without amplification as provided by a hearing aid or aids. Due to the number of observers attending during the first three days of the hearing, the IHO ordered the School to determine the maximum occupant load for the designated room in which the hearing was to be conducted by requesting the Fire Marshal of local authority issue a statement addressing such. The Indiana State Fire Marshal provided the requested information by letter dated August 26, 2008.

The two-year statute of limitations was applied in this matter. Both parties were informed that issues alleged to have occurred prior June 23, 2006, would not be considered.

The issues to be heard were read into the record. As indicated in the transcript, the issues were:

1. Does the Student require a full-time school program in order to receive a free and appropriate public education (FAPE)?<sup>5</sup>
2. Did the Student require extended school year (ESY) services for the summer of 2008, and if so, did the School fail to provide such services?
3. Were all required participants in attendance at a case conference committee (CCC) meeting held on April 30, 2008?
4. Were all required participants in attendance at a CCC meeting held on May 29, 2008?
5. Did the School fail to timely identify the Student as a Student with a disability in October of 2007, or at any time subsequent to this date?
6. Has the School provided the Student with appropriate special education or related services since October, 2007?
7. As a result of any failure of the School to provide the Student any required special education or related services, is the Student entitled to compensatory services, and if so what compensatory services?
8. Did the School fail to provide the Student's parents a copy of an individualized education plan (IEP) developed at the May 29, 2008, CCC meeting within ten (10) days?
9. Did the School fail to provide the Student with prior written notice of the School's denial to timely evaluate the Student?
10. Did the School fail to provide the Student with prior written notice of the School's denial to timely determine the Student to be eligible for special education services?
11. Did the School fail to provide the Student with prior written notice of the School's denial to determine the Student to be eligible for related services, including speech therapy?
12. Did the School fail to provide the Student with prior notice of the School's denial to timely determine the Student to be eligible for ESY services?
13. Due to the actions or inactions of the School, are the Student's parents entitled to reimbursement for the cost of private ESY services for the summer of 2008?
14. Did the School fail to provide the Student with prior written notice of denial to determine the Student to be eligible for a full-day kindergarten program?
15. Has the School failed to devise an appropriate IEP for the Student?
16. As a result of the actions or inactions of the School, has the Student been denied a free and appropriate education (FAPE)?

The IHO's written decision was issued on October 8, 2008. Based on the testimony at the hearing and in consideration of the documentary evidence submitted, the IHO determined the following 160 Findings of Fact.

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<sup>5</sup> The IHO identified the issue in his procedural history as "Does the Student require a full-time summer school program in order to receive a free and appropriate public education (FAPE)?" and added the following notation: "\* Note: The official transcript is incorrect in that the word "summer" was omitted. By the IHO's *Order on Prehearing Conference and Notification of Hearing*, dated July 7, 2008, and *Response to Petitioner's Request for Modification of Issues*, dated August 2, 2008, the issue stated includes the word summer. Either the IHO misread the issue during the final PHC on the first day of hearing or the transcriptionist failed to include the word summer in the transcription. The first issued to be decided in this matter is correctly stated above, and includes the word summer." The IHO's order dated August 2, 2008, granted the Student's request to modify the issues. One of the modifications was to delete "summer" from Issue # 1.

## **FINDINGS OF FACT**

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5 *et seq.* and 511 IAC 7-30-3, which gives the IHO the authority to hear and rule upon all matters presented.

2. All Findings of Fact, which can be deemed Conclusions of Law, are hereby deemed Conclusions of Law. All Conclusions of Law, which can be deemed Findings of Fact are hereby deemed Findings of Fact.

3. It was determined that all due process procedures were in compliance with requirements of 511 IAC 7-30-3 and IC 4-21.5 *et seq.*

4. At the time of hearing he Student was five (5) years, six (6) months and fifteen days old (DOB 2/3/03).

5. The Student sustained a traumatic brain injury due to blunt force trauma on October 28, 2007, which resulted in a "...borderline to mild acute neurocognitive impairment." [P101]

6. The Parents began private therapies for the Student as early as December, 2007. These services included speech, physical and occupational therapy.

7. The Parents first contacted the School inquiring about the possibilities of special education services for the Student on December 7, 2007.

8. The Parents were provided a copy of the School's procedural rights document on December 7, 2007.

9. The School's procedural rights document contained, among other things, established procedures for the referral of any student suspected of having a disability.

10. The School's procedural right document contained an explanation of the assessment process and timelines associated thereto.

11. The Parents stated that they received the School's procedural rights documents on December 7, 2007, and were offered an opportunity to ask for clarification of any contents at that time. The Parents testified that they did not carefully attend to the contents of this document, nor did they ask for clarification of any of its contents until January 28, 2008.

12. The School received a written referral with signed permission to conduct a multidisciplinary assessment on January 28, 2008. [R 0006]

13. The School responded with notification of its' intent to conduct an individual psycho educational evaluation on January 29, 2008. [P 0010]

14. The School completed its' assessment on, or about, April 2, 2008 [P 197] and presented the results of it's assessment at the Case Conference Committee (CCC) meeting of April 30, 2008; a period within sixty (60) instructional days from the date of having received permission from the Parents to conduct the initial assessment.

15. In addition to outside evaluations provided by the Parents, the School administered the Adaptive Behavior Assessment System: Parent/Primary Caregiver Form on April 8, 2008. Results revealed that the Student's adaptive behavior functioning was "...within the average range compared to other children his same chronological age (GAC standard score-94)." Subtest scores ranged from 87 to 95. [P 198]

16. The School's completed psychological evaluation, as performed by the School's psychologist, Christie Lammers, M.Ed., was made available to the School on or about April 2, 2008. This report was presented to Parents at the April 30, 2008, CCC meeting.

17. The School conducted an occupational therapy assessment as evidenced by written report dated May 29, 2008. This assessment states that "[The Student] presents with (sic) age appropriate fine motor and self help skills. He demonstrates mastery of the fine motor skills

needed for Kindergarten readiness.” The occupational therapist recommended “...monthly consultation for the first semester of kindergarten.” [P 241]

18. Parents alleged to be in possession of three (3) letters from “doctors” that that stated unequivocally that the Student required full-day kindergarten services during an initial meeting with the director of special education, Tom Bell.

19. When Tom Bell, local director of special education, requested to view these letters, the Parents were unable to produce them.

20. One such letter, allegedly provided by Victor Nanagas, M.D., FAAP, dated June 9, 2008, was a) unavailable at the time previously stated by the Parents, b) was not available at the time of either CCC meeting, and c) was not composed by Dr. Victor Nanagas.

21. Dr. Nanagas testified during hearing that a) he did not compose the letter [P 121], b) the Parents composed the letter for his signature, c) he signed this letter to the School on June 9, 2008, d) that he had no medical basis substantiating any of the claims presented in this letter, and e) that he had not seen the Student for a period of four (4) months prior to signing this letter.

22. The Parents also provided a letter from Laura Wilner, M.D. ( 3/13/08; P 103-105) wherein Dr. Wilner stated [P105] that the Student “...would really benefit from a more structured environment such as a school program. He expresses a desire to start kindergarten next year.”

23. The Student was determined by the CCC to be eligible for services as a student with a disability: Traumatic Brain Injury (TBI), with a secondary disability of Communication Disorder (CD), at the CCC meeting conducted on April 30, 2008, in compliance with both the Individuals With Disabilities Education Act (20 U.S.C 1400 et seq.) and Indiana’s Article 7 (511 IAC Rules 17-31, since amended as 511 IAC Rules 32-47, effective August 13, 2008). [P 185]

24. The Student began early childhood services (ECS) on May 5, 2008. ECS included a four day per week program for a total of twelve and one half (12 ½ ) hours per week. Additional services included speech; 120 minutes per week, occupational therapy; 20 minutes per week, and physical therapy; 20 minutes per week.

25. Both parents attended the April 30, 2008, CCC meeting and agreed to the School’s proposed ECS as demonstrated by their signatures on the CCC Report Form dated April 30, 2008. [P 186] The Parents further agreed to services to be provided from May 5, 2008, until May 8, 2009, as evidenced by their signatures. [P 208]

26. By their signatures, both parents acknowledged being in agreement with the recommendations of the CCC for the services to be provided, the recommended placement (least restrictive environment), and the duration of services ( May 5, 2008- May 5-2009). [P 208, R 0050]

27. Measureable goals and objectives were written for each of the areas of need identified. [P 201-207]

28. As reflected by the School’s ongoing assessments and further supported by testimony, the Student acquired benefit from these services in multiple areas. No convincing data to the contrary was presented by the Student.

29. Parents requested that services include a full-day kindergarten program beginning in the fall of 2008.

30. The School informed the Parents that the individual(s) who could respond to their requests for a full-day kindergarten program was/were not in attendance at the CCC conducted on April 30, 2008. However, the School proposed that an additional CCC meeting be scheduled and such person(s) would be in attendance.

31. A second CCC meeting was held on May 29, 2008, and was attended by all required participants.

32. The Parents again requested full-day kindergarten services begin on the inception of the fall 2008 academic semester.

33. During the CCC meeting conducted on May 29, 2008, the Parents were told that the district did not offer full-day kindergarten to students and any exception to the current kindergarten services offered by the School would require an administrative decision by the district superintendent and school board.

34. Although the Parents allege that they were told that the School had provided full-day kindergarten services to other students with disabilities in the past, the School denied having done so.

35. No student, with or without disabilities, was identified as having received full-day kindergarten provided by the School at any time. The School acknowledged that some related services had been provided previously to other kindergarten students beyond the regular kindergarten instructional day. The School offered to provide related services required by the Student beyond the proposed half-day kindergarten program beginning with the fall semester of 2008.

36. An individualized education plan, as modified from the April 30, 2008, document, was offered to the Parents at the CCC meeting of May 29, 2008.

37. The IEP offered by the School at the May 29, 2008, CCC included a half-day kindergarten program with additional services of speech therapy, occupational therapy, physical therapy, early childhood services, transportation services, and social skills training. [R 0073] Some of these services were proposed to be provided beyond the regular half-day kindergarten program.

38. An audiological assessment was conducted by Northside ENT Specialists [P 289-94] in December, 2007, and June, 2008. A report was issued by Northside ENT Specialists [P289-94], as provided by Jennifer Kees, M.A. CCC-A, on June 25, 2008. The Student's audiogram demonstrates that the Student, without correction (aids) has normal hearing in the left ear and a mild hearing loss in the right ear (25-40 db).

39. The Student was subsequently fitted with a hearing aid for his right ear. The date the Student received a hearing aid was not established, but was provided prior to the April 30, 2008, CCC meeting.

40. The Student does not experience any difficulty with the fit of this hearing aid or complains of wearing this instrument.

41. There is no formal audiological assessment that measures the Student's hearing abilities with correction. The parties report the Student does not display any difficulty responding to auditory stimuli when wearing his hearing aid.

42. There is no mention of the Student having a thirty percent (30%) hearing loss contained in the audiology report issued by Jennifer Kees. [P 289-290]

43. The Student claims to have suffered a one third (1/3) loss in hearing. There is no reliable data to support such claim. Additionally, such claim is made by the Student without regard to hearing being assisted by the hearing aid to the damaged right ear. As noted previously, audiological assessments reflect normal hearing in the left ear. [P 289]

44. The Student does not demonstrate any difficulty with hearing in any setting while wearing the hearing aid, including the home, school or community environments. Jennifer Kees, Audiologist, reports that "Michael was fit with a hearing aid and is doing very well with it." [P 289]

45. Jennifer Kees, Audiologist, recommended that the Student be provided a personal FM system and that "A price quotation for an FM system is available upon request." [P 290]. Ms. Kees further declared that the Student was eligible for special education or related services as a



student with a hearing impairment according to Article 7. The student is not eligible for special education or related services as a student with a disability who is deaf or hard of hearing as per 511 IAC 7-41-4.

46. An occupational therapy evaluation from Frazier Rehabilitation Institute, Jewish Hospital Health Network, completed on November 5, 2007, states, in part, that “[The] Pt. becomes agitated in the presence of family when he experiences mild frustration.” [P 62]

47. Parents reported multiple difficulties not observed in the school setting, including memory loss and behavioral outbursts. None of these difficulties were observed in the school setting or during field trips provided by the School.

48. A speech/language evaluation was conducted on November 9, 2007, by St. Vincent Pediatric Rehabilitation Center. This report reveals that, at the time of the evaluation, according to the Parents the Student’s “... current cognitive level is approximately the same as his pre-injury abilities. It was reported that he has always been somewhat shy and will tend to mumble when introduced to new people....Currently his parents believe that [the Student’s] hearing is in good condition...” [P 78]

49. The Student received health services through the Pediatric Rehabilitation Center of St. Vincent Hospital and Health Services between November 9, 2007, and March 31, 2008. A report was issued to the Parents on April 1, 2008. [P 114] Multiple Short-term and long term goals were listed. Many of the short term goals were identified as having been met and new goals were established. Most of the new goals were assessed as having been met during the treatment period. The remaining short term goals were evaluated as a) progress being made or b) being partially met. Long term goals were recorded and were projected to be accomplished by November 9, 2008. The report stated that most of the long-term goals had been met or partially met by the end of the treatment period, being late March, 2008. Four long term goals were identified as “ongoing”. [P 114-118]

50. Assessment data was provided to the School from Lindamood-Bell Learning Processes [P 13-15] in documents submitted by the Student in the exchange of documents prior to hearing. Results obtained from this report were not available to the School at either the April 30, 2008, or May 29, 2008, CCC meetings.

51. The School’s psycho educational evaluation, as presented at the April 30, 2008, CCC meeting, formed the basis for the CCC’s determination of eligibility and services to be provided through the ECS Program. This evaluation was primarily based on reports provided to the School by the Parents and the Parent’s private service providers. The School did not make a meaningful attempt to either verify the data presented or acquire their own assessment data. [P 150, 187, 188] The only additional assessment that could be identified in the School’s psycho educational evaluation, dated April 2, 2008, was an administration of the Adaptive Behavior Assessment System-II, Parent Form. [P 151]. All information gained from this assessment was by Parent Report.

52. The Student was evaluated by Bryan Hudson, Ph.D., HSPP, DABPS, Pediatric Neurologic Associates, PC, on January 2, 2008. Results of this assessment were made available to the Parents on January 4, 2008. Findings included: a) “Receptive language appeared to be *relatively unremarkable* [emphasis added] for very basic level speech. Expressive language was *slightly* [emphasis added] disturbed regarding articulation. Speech fluency was unremarkable. Thought processing was generally with appropriate speed and content was tasks (sic) appropriate.” [P 101]

53. Dr. Hudson’s report further stated that “Despite the patient’s injuries, he performed relatively well on the majority of the functional domains examined by the NEPSY.” [P 101]

54. Dr. Hudson also reported obtaining the following intelligence quotients as being derived from an administration of A Developmental Neuropsychological Assessment (NEPSY): Verbal I.Q. 92, Visual IQ of 132, and “General” IQ of 112. [P 101, 137, 187] Subsequent testimony was revealing as to the actual instrument used to obtain these I.Q. scores. Dr. Hudson stated under cross examination that he had administered the Wide Range Intelligence Test (WRIT) and the previously cited intelligence quotients actually resulted from this instrument, not the NEPSY. Test protocols from this instrument had not been provided to the School by Dr. Hudson at the time of his testimony, August 18, 2008, in defiance to two subpoenas.

55. Subsequent to the IHO’s declaration that unless Dr. Hudson release all documents pertaining to the Student in his possession, or available to him, his testimony, documents bearing his signature, and any testimony relating to Dr. Hudson’s testimony or documents bearing his signature would be excluded, additional documents were made available. These additional documents included a protocol of the WRIT, showing the date of administration being January 2, 2008, [R 874], the NEPSY protocols, and other documents.

56. Dr. Hudson conducted a re-evaluation of the Student on July 7, 2008, with results being provided to the Parents on July 12, 2008.

57. Neuropsychological assessment strongly suggests, while skills were variable at the time of assessment, the Student’s skills fell within, or above, the range of average performance (range 85-132; mean 100, standard deviation 15).

58. Additional medical and related records available to the Student were not made available to the School by the Parents until the third day of hearing after having assured the School, both independently and through counsel on multiple occasions, that all such records had been made available to the School. The Parents withheld documents from the School that were available to them and were only made available during hearing under threat of excluding the testimony and any documents associated with their primary witness.

59. Retest results found that the Student’s activity level was *somewhat* [emphasis added] hyperkinetic but behavior and attention was “typically easy to redirect.” Gross motor processes were *slightly diminished* [emphasis added] bilaterally, and the Student’s ability to focus attention “remains unremarkable.” [R 748] Additionally, Dr. Hudson concluded that the Student’s “...social interaction was age appropriate.” [R 697]

60. Dr. Hudson’s report of July 12, 2008, included several recommendations, the most notable of which stated that the Student “... would also require an extended school year given the deficits demonstrated in working memory and consolidations, as he will likely lose much of what he has apparently learned if not reinforced in a highly repetitive fashion. Moreover, his ability to effectively use what he has apparently learned will also require extended repetition and exposure, as what would be afforded through an extended school year.” [P 749] As cited previously, the School provided the Student with ESY services.

61. Dr. Hudson’s report did not include a statement regarding a possible thirty percent (30%) loss of his skills, as compared to his peers, unless the Student was provided a full-day kindergarten program for the 2008-2009 school year. Neither did any other private provider’s report make such a claim, with the notable exception of correspondence attributed to Dr. Victor Nanagas, whose “letter” was not authored by Dr. Nanagas, but rather authored by the Parents.

62. When making his recommendations at the April 30, 2008, and May 29, 2008, CCC meetings, Dr. Hudson had not previously communicated with the School (or the School with him) at any time prior to or subsequent to making his recommendations. Dr. Hudson has not observed the Student in any setting other than his office.

63. Dr. Hudson stated that he had not observed the Student between January 2, 2008, and April 30, 2008.

64. The lowest reliability coefficients for the NEPSY, according to the test publisher, Pearson Psychological Corporation, occur in the subtests of visual-spatial and sensori-motor. Additionally, the lowest reliability coefficients for almost all psychological assessment instruments, the NEPSY included, occur at the extreme age ranges assessed by the instrument. The two versions of the NEPSY that were administered by Dr. Hudson were, at the time of administration, at the age extremes for these instruments. The first administration conducted on January 2, 2008, occurred when the Student was four (4) years, ten (10) months and twenty-nine days (4-10-29) of age. The age ranges measured by this version of the NEPSY are three (3) years through four (4) years, eleven months of age. The second administration of the NEPSY occurred on July 7, 2008. At the time of the administration, the Student was five (5) years, five (5) months, and three (3) days old (05-05-03). The youngest age for which this instrument is normed is for five (5) years and 0 months of age.

65. Both administrations of the NEPSY were conducted using a replaced version of the test. A new edition of the NEPSY has been available since June 2007 (Mental Measurements Yearbook, 14th Ed). It was unclear why the older versions of these tests were administered.

66. Dr. Hudson testified that the reason he refused to respond to either of the subpoenas issued, which required release of test data including the NEPSY, was that there was no one in the school qualified to administer or interpret the results of the NEPSY instrument. According to the publisher, the requirements for administration and scoring of the NEPSY are the same as for multiple other psycho-educational instruments including the Wechsler series and the Stanford Binet tests of intellectual abilities. The NEPSY test manual states that the qualifications of examiners "...who use the NEPSY should have graduate-level training and experience in the administration and interpretation of standardized clinical instruments". [Page 24] A doctor of philosophy (Ph.D.) is not required for the administration, scoring or interpretation of the above referenced assessment instruments.

67. Many school districts have their own copy of the NEPSY which is available to the school psychologist serving the school. Many departments of educational and school psychology include training on the NEPSY instrument in their graduate-level programs.

68. The Parents reported to Laura Wilner, M.D. on or about December 13, 2007, that with some exceptions, the Student's "...cognitive skills are on par with his pre-injury status." [R 694]

69. The Student received a speech therapy evaluation from Kosair Children's Hospital on November 6, 2007.

70. The Student was evaluated at the St. Vincent's Pediatric Rehabilitation Center on November 9, 2007.

71. A report from the Neurosurgical Institute of Kentucky, conducted by Thomas M. Moriarty, M.D., and published on December 30, 2007, stated that "He has had just dramatic healing of his skull based fracture. It is really impressive. All the intracranial layer is gone. The brain looks normal." [R 374] Dr. Moriarty discharged the Student from neurosurgical follow-up on November 8, 2007.

72. The Student was provided prior written notification of the CCC meeting to be held on April 29, 2008, on April 16, 2008. This notification included a statement of the purpose of the CCC, the date, time and place of the CCC, and those anticipated to be in attendance. [R 0011]

73. Parents reported repeatedly that the Student required instruction in self-help skills, particularly because he refused to brush his teeth. In a report from Victor Nanagas, M.D. dated March 17, 2008, Dr. Nanagas stated that "Per parent report, he [the Student] is now brushing his teeth at home (and at therapy) without resistance or refusal." The Student "...is progressing nicely with his therapy, and is generally cooperative and works diligently during treatment sessions." [R

0036] The School reported similar findings concerning the Student's behavior and skills while in the educational environment.

74. The results of the April 29, 2008, CCC meeting was made available to the Student on April 30, 2008. All findings and recommendations of the CCC were included in this report, which included an initial IEP. [0011]

75. The CCC meeting of April 30, 2008, was attended by the following individuals: Camilla Britt, Early Childhood Coordinator; Jennifer Freeman, Elementary School Counselor; Damian and Amy Berns, Parents; Mary Beth Ward, Special Education Teacher; Christie Lammers, School Psychologist; an unidentified Speech/Language Assistant Pathologist; Susan Kump, Occupational Therapist; Debra Gasteneau, Physical Therapist; Charlanne Tunison, position not indicated; and Bryan Hudson, M.D. (via telephone).

76. At the April 29, 2008, CCC meeting fourteen "Measurable, Short-term Instructional Objectives or Benchmarks(s), including objective criteria" were identified [P 235-240]. These objectives or benchmarks were written in a manner which would permit adequate evaluation. Areas addressed by these objectives or benchmarks included vision, cognitive skills, academic skills fine/gross motor skills, adaptive behavior/vocational leisure, communication/language skills, social and emotional behavior, and medical needs. [P 235-236]

77. The Student began receiving one-half day ECS on May 5, 2008. Services were continued for approximately four (4) weeks. The School used this time period, in part, as an evaluative period during which the Student's skills and needs were assessed. The results of this evaluative period were then used to modify, as appropriate, the Student's educational program and related services proposed for the 2008-2009 school year.

78. The Peabody Developmental Motor Skills, 2nd Edition, was administered on May 19, 2008. The Student scored well within the average range (MQ 103). [P 241]

79. A second CCC meeting was held on May 30, 2008, wherein the proposed IEP of April 29, 2008 was reviewed. Participants included: Cassandra Felus, Agency Representative; Carmilla Britt, Early Childhood Coordinator; Damian Berns, Amy Berns, Parents; Tracy Clark, Special Education Teacher; Tonya Kneller, Speech/Language Pathologist; Susan Kunzs, Occupational Therapist; Deb Gastneau, Physical Therapist; Charlanne Tunisson, position not indicated; Cathy Lott, Teacher for Hearing Impaired; and Sara Graham, position not indicated. [P 234]

80. The School provided the Student prior written notification of the CCC meeting scheduled for and conducted on May 29, 2008, on May 16, 2008, which included a statement of the purpose of the CCC, the date, time and place of the CCC, and those anticipated to be in attendance. [R0056] By signature, the Parents acknowledged receipt of notice of the CCC meeting scheduled for May 29, 2008, CCC on May 19, 2008. [R 168]

81. The results of the April 30, 2008, CCC meeting was made available to the Student on April 30, 2008. All findings and recommendations of the CCC were included in this report, which included an initial IEP. [0059]

82. Goals and objectives were reviewed during the May 29, 2008, CCC meeting and four new social skill goals/objectives were identified. [P 246]

83. The CCC proposed a variety of special education and related services be provided the Student at the May 29, 2008, CCC meeting. [P 248] Parental input was provided and considered by the CCC. The frequency and duration of services originally proposed by the CCC were modified to reflect the Parent's requests.

84. ECS were offered through the Early Childhood Services program, delivered at Brooks Elementary School. These services began at the end of the school year and continued through the month of June. [P 252] Documents reveal that the extended school year services began on June 9,

2008, and concluded on June 26, 2008. [R 94] Services were provided in the regular Early Childhood classroom two days per week for three and one-half (3 ½ ) hours per day.

85. The proposed placement for the Student for the 2008- 2009 academic year was Sand Creek Elementary School, general education classes. Services were to be delivered via a one-half day kindergarten program with additional services provided beyond the regular kindergarten hours. [P 254]

86. The Parents did not agree with the proposed services as indicated by the lack of Parental signature on the proposed IEP. [P 250]

87. Testimony and documents demonstrate that each party to this matter clearly understood the other's position regarding the provision of services for this Student since the day of referral: January 24, 2008. All actions, or proposed actions, including denial of specific services provided or offered by the School, were adequately communicated to the Parents. While a disagreement remains regarding the type of service to which the Student is entitled for the 2008-2009 school year, documents and testimony relating to the issue of full-day kindergarten vs. half-day kindergarten with extended services has been clearly articulated by each party to the other throughout this entire process. Multiple communications have transpired between the parties on this and all other issues under consideration, including CCC notes, CCC meetings, e-mail, and letters, since the Student first made contact with the School.

88. The School proposed to conduct a third CCC meeting on June 19, 2008, for the purpose of discussing any additional services the Student may require. The Parents responded in writing that "...upon advice from counsel we are canceling the case conference/meeting to be held on Thursday June 19 @ 9 a.m." [R 0093]

89. The Parents requested either a Mediation or Resolution Session be provided in order to resolve the impasse regarding their request for full-day kindergarten services. The School declined to participate in either a mediation or resolution session for the purpose of addressing full-day kindergarten services.

90. Special transportation was provided beginning on May 5, 2008. [P 225]

91. Classroom observations conducted by school personnel, including Christine Jacobs, MS, OTR, revealed the Student "...presents with (sic) age appropriate fine motor and self help skills...needed for Kindergarten readiness." [P 241] The only occupational therapy service recommended by Christine Jacobs was monthly consultation for the first semester of kindergarten.

92. During the months of May and June, 2008, the School provided approximately 70 clock hours of services to the Student consisting of ECS and ESY services. These services included a range of interventions, both educational and related services, which were provided by multiple, appropriately licensed, school personnel. Progress reports relating to the Student's performance in each of the services provided were made available to the Parents.

93. Each of the School's witnesses testified that the Student made notable gains in all areas observed during the period of time he participated in the School's programs.

94. A progress report was issued to the Parents on May 8, 2008. Student progress was again reviewed and discussed at the May 29, 2008, CCC meeting. [P 242]

95. The Indiana Standards Tool for Alternate Reporting (ISTAR) was administered and a Report Summary composed on May 29, 2008. This report was shared with the Parents at the May 29, 2008, CCC meeting. Scores ranged from F 2.33 (Writing Application) to F 2.66 (Speech Intelligibility). [P 243-244]

96. The CCC's recommendation to the Parents was that the Student would continue to be eligible for special education and related services under the primary category of Traumatic Brain Injury, with a secondary disability of Communication Disorders. [P 245]

97. The School's representatives determined that the Student's behavior did not impede his learning or the learning of others, nor was he hard of hearing. Assistive Technology Services were recommended; however, such services were not specified. Related services of speech/language, social skills, occupational therapy, and physical therapy were identified as educational needs.

98. Tonya Keller, a privately obtained speech therapist, testified that she had never observed the Student in an educational setting, or discussed the Student's strengths, weaknesses, needs, or educational programming, current or future, with anyone from the School. However, she did maintain that the Student's hearing impairment was so severe that he would require an FM system in order to participate in an educational setting. She confirmed that 1) the Student's hearing in one ear was normal, and 2) a hearing assessment had not been conducted while the Student was wearing a hearing aid in the other ear.

99. During a meeting conducted on June 11, 2008, participants being both parents and Tom Bell, Director of Special Education, the School offered to extend the Student's school day for the 2008-2009 academic year beyond the regular kindergarten school day by providing speech, resource, and social skills training beyond the scheduled kindergarten day. The Parents rejected the School's offer.

100. Contained within an electronic mail (e-mail) sent to Bryan Hudson, M.D. from the Parents on June 9, 2008, the Parents stated that "First, since you said if a full day kindergarten was available, that would be the **ultimate** (emphasis added). We don't think they feel like they have to make that available to him since they don't readily make that an available option." [R 816] Further, the Parents requested "Can you help? Would it make a difference if we had anything from you specifically stating that you are requesting a full day program for Michael?" [R 817]

101. The School does not make a full-day kindergarten program available to students, with or without disabilities. As per testimony, the School has provided additional services to students with disabilities beyond the normally scheduled kindergarten day, and offered to do the same for the Student.

102. While the Student's Parents report multiple behavioral issues in the home environment, the School and multiple private providers report few, if any, difficulties regarding the Student's behavior in their presence. Behavioral issues that were mentioned in the reports of private providers were primarily based on parental report.

103. The School did not conduct an additional assessment of the Student's hearing subsequent subsequent to receiving the report from Jennifer Kees, Audiologist. However, no one, including testimony of the Parents, their witnesses, and witnesses for the School purported that the Student failed to respond appropriately to auditory stimulation, including oral directions from a range of adults and other children, at any time subsequent to being fitted for a hearing aid in his right ear.

104. The Student was never referred to the School for the purpose of determining eligibility for special education and related services as a student with a hearing impairment. As such, he was not assessed by the School for the purpose of considering eligibility for services as a student with a hearing impairment.

105. The School has offered a morning and afternoon ECS program to some students in the past. The decision as to whether a student would receive both a morning and afternoon ECS program was made by the CCC and was based upon the needs of the Student. In this case, the School did not offer to provide a morning and afternoon ECS program for the Student, determining the Student did not require such.

106. The Parents chose to terminate the May 30, 2008, CCC meeting prior to completing discussions regarding ESY services and additional services being proposed for the Student for the 2008-2009 school year. As a result, a revised IEP was not completed at this meeting of the CCC.

107. The Student received a total of approximately fifty (50) hours of early childhood services between May 5, 2008, and June 5, 2008.

108. The Student received a total of approximately twenty (20) hours of early childhood/extended school year services during the month of June, 2008.

109. Casey Felis, Assistant Director of Special Education in charge of elementary special education programs, testified that even though the School did not feel the Student required ESY services the School provided those services in acquiescence to parental demands.

110. The Student's progress in areas specified in the IEP, which were applicable to educational programming and related services provided by the School during the month of May, 2008, were measured and the Student's progress was reported to the Parents during the May 29, 2008, CCC meeting.

111. Both parties stipulated that the audio recording of the April 30, 2008, and May 29, 2008, CCC meetings is an accurate recording.

112. Camilla Britt, Coordinator of Early Childhood Services was in attendance at the April 30, CCC meeting, and served as Agency Representative. Casey Felus, Assistant Director of Special Education, and responsible for elementary special education programs, which includes kindergarten programs, was in attendance at the May 29, 2008, CCC meeting. Ms. Felus served in the capacity of Agency Representative.

113. Jennifer Kees, Audiologist for Northside ENT, stated that while all students that have a mild hearing loss in one ear will not need an FM system in order to do well in school, this Student deserves an FM system in order "...to make it as *easy as possible* (emphasis added) for him to participate in an academic environment."

114. The Student's hearing loss is not likely to worsen and is projected to be corrected by surgery in the foreseeable future.

115. The Student was provided speech therapy services consistent with those listed during the April 30, 2008, CCC meeting by the School and as recorded in the Student's IEP developed at that time. By signature, the Parents agreed to these speech services.

116. Multiple witnesses reported that when the Student displayed "off task" or other inappropriate behaviors, he was "easy to re-direct" or such behaviors were "short lived."

117. School personnel observed the Student's behavior in a variety of settings over time, including the school and community without encountering behaviors that would be atypical for a child of the Student's chronological age, including the Student's interactions with his peers.

118. The Student never required a "cool down" or "time out" area, or "non-violent" interventions during any School day.

119. The ISTAR summary reveals that the Student performed at composite score of F2.54 in mathematics, F2.49 in language arts and F2.68 in speech. The functional areas (physical skills, personal care skills, and socio-emotional skills) were scored at the 65% level. These scores suggest that the Student is performing overall at a level generally commensurate with age expectations and are comparable to those scores that would be obtained by a non-disabled peer of approximately the same chronological age.

120. No persistent memory problems have been observed in the school setting.

121. No extensive mood shifts have been observed in the school setting.

122. No regression of skills, social, academic, physical, behavioral, or speech has been observed in the school setting. No reliable data that can be attributed to the extent or quality of

services provided by the School demonstrate regression in these areas since the initiation of services provided by the school.

123. The ISTAR scores were based on teacher observations.

124. Tracy Mark, Early Childhood Teacher, possesses a teaching license for the State of Indiana in both hearing impaired and mild mental disabilities.

125. It was established that the early childhood classes in which the Student participated was composed primarily of students without disabilities.

126. Testimony revealed that over half of the students participating in the ECS program with the Student transitioned to regular kindergarten classes for the fall semester of 2008.

127. It was clear that the Parents were not willing to consider any offer of services from the School that did not include a “full-day” program, meaning both a morning and afternoon session. The primary basis for this dispute had little to do with specific services that may be needed by the Student, or other procedural matters (See original *Request for a Due Process Hearing*). Additionally, only minimal effort was directed toward obtaining any additional specific services the Student might receive in a second session of kindergarten, but rather that he participate in two kindergarten sessions each day for the Fall 2008 academic semester for the sake of simply repeating the same instruction provided in an earlier session. The Student’s alleged need for such repetition was based on the report issued by Dr. Hudson.

128. Tracy Mark, Early Childhood Teacher, received a brief “overview” of the Student’s specialized needs from Camilla Britt, Early Childhood Coordinator, and the Student’s Parents prior to instructing the Student.

129. Victor Nanagas, M.D., pediatrician for the Student, testified that he did not release all medical records in his possession pursuant to subpoena. Specifically, Dr. Nanagas stated that he had in his possession the results of Dr. Bryan Hudson’s assessments but failed to provide them to the School. He further testified that he did not know why he failed to provide these documents to the School.

130. Dr. Nanagas issued a report dated February 27, 2008, which states in part that the “Child is able to participate in normal activities without restrictions which includes daycare, school sports, or camp.” [P 653]

131. Christopher Sullivan, Ph.D., Neuropsychologist, testified as a witness for the School on August 29, 2008. Dr. Sullivan’s exposure to the Student was limited to a review of records and reports provided him by the School. Subject to review of available records, Dr. Sullivan’s most significant conclusions were: a) the Student is demonstrating a trajectory of recovery that is quite positive, b) the Student will continue to need some special education services for the immediate future, c) young children’s performance on standardized tests typically vary, d) some of the variance in scores noted on the NESPY are within the standard error of measurement, e) the information the School relied on for determining eligibility was complete enough to support the determination of eligibility, f) there is no reliable data, including the two administrations of the NEPSY, to document a decline in the Student’s performance across scales, g) variance in performance is quite typical of young children, especially when administering different batteries (versions) of an instrument, h) no young child will display an uninterrupted smooth trajectory of growth, be it socio-emotional, behavioral, cognitive, academic, motor development, or speech and language functions, i) the Student’s progress demonstrates significant improvement in multiple areas of performance to the degree that the Student’s present level of insult is most appropriately categorized as being in the mild range, and j) there is no reliable basis for predicting that the Student will lose data at a thirty percent (30%) rate greater than his peers.



132. Data regarding school readiness, as measured by normed referenced assessment, was not available to the School at the time decisions were made regarding the development of the Student's IEP on or before April 30, 2008. However, sufficient data was available to support the decision of the CCC when it designed the Student's initial IEP.

133. The only scores addressing the Student's intelligence as initially provided to the School were incorrectly associated with the NESPY. As previously noted, the NEPSY does not yield intelligence scores.

134. All parties agreed, in writing, that the Student required ESY services.

135. The Student was provided early childhood enrichment services beginning on June 9, 2008, and concluding on June 26, 2008. These services were also referred to as ESY services.

136. Progress reports were made available to the Parents throughout the time the Student received services from the School.

137. The School considered all reports and recommendations of all outside providers as they designed services for the Student.

138. The School considered all information provided by the Parents as they designed services for the Student.

139. During the tenure of the School-based services, the School performed a variety of observational and informal evaluations of the Student's response to instruction and progress being attained through related services.

140. School data collected during this time period documented that the Student made gains in multiple areas.

141. During the CCC meeting of May 29, 2008, the Parents made multiple proposals for services to be made available to the Student for the 2008-2009 school year. Such proposals consisted of some arrangement for the Student to remain at school for a full school day.

142. The Parents stated on multiple occasions, including the audio recording provided by the Parents of the CCC meetings of April 30, 2008, and May 29, 2008, that Dr. Hudson had told them that a full-day kindergarten program was the "ultimate." No one, either by testimony or in writing, stated that the Student would not receive significant benefit from attending a one-half (1/2) day kindergarten program; only that the full-day kindergarten placement would be better.

143. Dr. Hudson reported during the CCC meeting of April 30, 2008, that some decline in function would be likely as the part of the brain controlling that function or skill was repairing itself. [Audio Tape, April 29, 2008, CCC meeting; minute 30]

144. During the May 29, 2008, CCC meeting, the Parents stated that they understood that Dr. Hudson had told them that the Student was likely to exhibit "decreases and gains" in performance. [Audio Tape, May 29, 2008 CCC meeting; minute 1:02]

145. The stated purpose of the April 30, 2008, CCC meeting was articulated to be an effort to provide services to the Student as soon as possible. [Audio Tape, April 30, 2008, CCC meeting; minute 32.3] The School also explained to the Parents that one of the purposes of the proposed ECS program was to provide the School an opportunity to assess, in a school environment, the Student's strengths and weakness, skills and deficits, so as to allow the School to understand and provide for the Student's needs.

146. At the April 30, 2008, CCC meeting the Parents reported that the Student enjoys learning. No behavioral issues were presented by either the Parents or Dr. Hudson that would interfere with the ability of the School to manage the Student's behavior in a school setting without a formal, written behavior intervention plan. Some recommendations for voice volume and time out procedures were recommended to be employed in the school environment under specified circumstances. Parents and Dr. Hudson stated that these procedures had been effective in the past in the home and clinical settings. The School indicated willingness to implement these

procedures when and if necessary. The School later reported that behavior was not an issue during any School program or service provided that would make additional behavioral interventions necessary. [Audio Tape, April 29, 2008, CCC meeting; minute 39]

147. The Parents reported that the Student responded well to a behavioral intervention of receiving stickers for compliance with requests to wash hands; so much so that the Student had begun to wash his hands repeatedly in order to earn stickers. The Student responds well to very basic behavioral interventions. [Audio Tape, April 29, 2008, CCC meeting; minute 46]

148. The Parents stated during the April 30, 2008, CCC meeting that the Student's hearing aid had corrected his hearing "problem". (Audio Tape, April 30, 2008, CCC meeting; minute 49).

149. No fine motor or visual perceptual difficulties were noted by either party. [Audio Tape, April 30, 2008, CCC meeting; minute 53]

150. The Parents report that the Student was not aggressive to other children in his day-care setting. [Audio Tape, April 30, 2008, CCC meeting; minute 53]

151. The Parents were questioned in depth during the April 30, 2008, meeting by the School's related service providers and others regarding the Student's needs for social skills, physical, motor, emotional, verbal, and speech skills. Appropriate goals and objectives were based, in part, on the Parent's responses and incorporated into the April 30, 2008, IEP to which the Parents agreed to the types and duration of services to be provided and the educational environment in which such services would be provided.

152. During the April 30, 2008, CCC the Parents were provided prior notice that the School did not currently offer full-day kindergarten services. However, the Parents were told that, Casey Felis, Assistant Director of Special Education, was a person who could respond more appropriately to their request for full-day kindergarten services and that Ms. Felis would be in attendance for the CCC meeting scheduled for May 29, 2008. The Parents were told that Ms. Felis "...makes decisions for programming."

153. The Parents received a written report of the May 29, 2008, CCC through counsel at some point, date uncertain, but beyond ten days. However, the Parents had also made an audio recording of both the April 30, 2008, and May 29, 2008, CCC meetings unbeknown to the School.

154. The name of a contact person (unidentifiable on the Audio Tape, April 30, 2008, CCC meeting) was provided to the Parents.

155. The Parents reiterated their insistence that the School must provide for a full-day kindergarten program because Dr. Hudson recommended such. [Audio recording, April 30, 2008, CCC meeting; 2 hour, 2 minutes]

156. At the second CCC meeting, held on May 29, 2008, Casey Felus, Assistant Director of Special Education, served as the agency's representative. Tracey Mark, kindergarten teacher, attended in that the parties had previously agreed that the Student would receive kindergarten services during the 2008-2009 school- year, even though the length of kindergarten services remained in dispute. This CCC meeting lasted for one (1) hour and nineteen (19) minutes.

157. Subject to modification of the CCC's original proposal for services for the 2008-2009 school year as requested by the Parents, the parties did not state any further disagreements regarding the type, frequency, length of the services, or the educational environment in which such services were proposed to be provided until it became clear the School was not going to agree to a two session per day (full-day) kindergarten.

158. The Parents reiterated once more that the School should be required to provide full-day kindergarten services because "...Dr. Hudson said that full-day kindergarten was the ultimate." [Audio recording, May 29, 2008, CCC meeting; minute 54, and 1 hour 2 minutes]

159. Casey Felus stated that while she wished that the School could offer full-day kindergarten services, the district currently did not offer such services to any child.

160. The May 29, 2008, CCC meeting adjourned without parties having reached agreement regarding services to be provided the Student for the 2008-2009 school year.

Based on the foregoing Findings of Fact, the IHO made the following Conclusions of Law.<sup>6</sup>

### **CONCLUSIONS OF LAW**

#### **6. Issue #1:**

**Does the Student require a full-time summer school program in order to receive a free and appropriate public education (FAPE)?**

#### **Answer: No**

The CCC is charged with multiple responsibilities, one of the more significant of which is determining the type and duration of services an eligible student will receive. In this instance the School considered all relevant data available to it at the April 30, 2008, and May 29, 2008, CCC meetings, and based on these data, made the determination that the Student did not require a full-time summer school program in order to receive a free and appropriate public education. The Parents unilaterally terminated the May 29, 2008, CCC meeting prior to the development of an IEP which would have potentially provided services beyond those the Student received during the summer of 2008. The basis for the Parents termination of the May 29, 2008, CCC meeting had significantly more to do with the ongoing dispute with the School regarding full-day versus half-day kindergarten services for the fall semester of 2008 than services, or duration of such services, to be provided the Student during the summer of 2008. The Parent's objection to summer services offered by the School was filed after the fact, rather than before.

As such, the Student does not require a full-time summer school program in order to receive a free and appropriate public education (FAPE).

#### **7. Issue #2:**

**Did the Student require extended school year (ESY) services for the summer of 2008, and if so, did the School fail to provide such services?**

#### **Answer: Yes and No**

Extended school year services are defined as those services that:

- (1) Are provided to a student with a disability:
  - (A) beyond the normal school year of the public agency;
  - (B) in accordance with the Student's individualized education program; and
  - (C) at no cost to the parent of the student; and which
- (2) meet the standards of the state agency. [511 IAC 7-17-35]

The Student's current individualized education program (IEP) should include a statement of extended school year services (ESY) if such services are to be provided. [511 IAC 7-27-6 (a)(8)] Additionally, the School is required to ensure "... that extended school year services are available

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<sup>6</sup> The first five Conclusions of Law that appeared in the IHO's written decision were jurisdictional. These have been removed as they are not relevant in this appeal.

as necessary to provide free appropriate public education. A public agency may not limit extended school year services to particular categories of disability or unilaterally limit the type, amount, or duration of those services.” [511 IAC 7-21-3 (b)]

In the current matter, the School and Parents agreed that ESY services were required to ensure the Student receive a free and appropriate education, and the type and duration of those services as indicated by the Parent’s signature on the CCC Report of April 30, 2008. These ESY services were to begin on May 5, 2008. Then, as per agreement, the School proceeded to place the Student in the early childhood ESY program.

As such, the parties agreed that the Student required ESY services during the summer of 2008. The School provided those services as agreed to in the then current Student’s IEP.

**8. Issue #3:**

**Were all required participants in attendance at a Case Conference Committee (CCC) meeting held on April 30, 2008?**

**Answer: Yes**

Article 7 requires the following to be in attendance at meeting of the CCC with noted exceptions. Required attendees include:

- “(1) A representative of the public agency, other than the student’s special education teacher, who has the following qualifications:
  - (A) Is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of students with disabilities.
  - (B) Is knowledgeable about the general education curriculum.
  - (C) Is knowledgeable about the availability or resources of the public agency.
- (2) The student’s current teacher of record...
- (3) One (1) of the student’s general education teachers, if the student is or may be participating in the general education environment.
- (4) The parent of a student less than eighteen (18) years of age...” [511-IAC 7-27-3 (a)(1-4)]

In addition to the above, “...at the discretion of the parent or the School, other individuals who have knowledge or special expertise regarding the student ...may participate in the case conference meeting.” [511 IAC 7-27-3 (f)]

All required members of the CCC were in attendance at the April 30, 2008, CCC meeting. The Student contends that an agency representative was not available at this CCC meeting who could make the decision that the School would provide the Student with a full-day (2 sessions per day) kindergarten program for the 2008-2009 school year.

As previously cited, all required participants were available at, and participated in, this CCC meeting. Additionally, no representative of a public agency can obligate a public school agency for services beyond those currently offered any student or are not required by state statute. The School does not provide full-day kindergarten services to any student nor is the School required to provide such services to any student. At the time of this writing, full-day kindergarten is an option of the local public agency in Indiana.

As such, all required participants were in attendance at a CCC meeting held on April 30, 2008.

**9. Issue #4:**

**Were all required participants in attendance at a Case Conference Committee (CCC) meeting held on May 29, 2008?**

**Answer: Yes**

Article 7 requires the following to be in attendance at meeting of the CCC with noted exceptions. Required attendees include:

“(1) A representative of the public agency, other than the student’s special education teacher, who has the following qualifications:

(A) Is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of students with disabilities.

(B) Is knowledgeable about the general education curriculum.

(C) Is knowledgeable about the availability or resources of the public agency.

(2) The student’s current teacher of record...

(3) One (1) of the student’s general education teachers, if the student is or may be participating in the general education environment.

(4) The parent of a student less than eighteen (18) years of age...” [511-IAC 7-27-3 (a)(1-4)]

In addition to the above, “...at the discretion of the parent of the student, other individuals who have knowledge or special expertise regarding the student ...may participate in the case conference meeting.” [511 IAC 7-27-3 (f)]

All required members of the CCC were in attendance at the May 29, 2008, CCC meeting, including a representative of the public agency. The Student contends that an agency representative was not available at this CCC meeting who could make the decision that the School would provide the Student with a full-day (2 sessions per day) kindergarten program for the 2008-2009 school year.

As previously cited, all required participants were available at, and participated in, this CCC meeting. Additionally, no representative of a public agency can obligate a public school agency for services beyond those currently offered any student or are not required by state statute. The School does not provide full-day kindergarten services to any student nor is the School required to provide such services under state statute.

As such, all required participants were in attendance at a case conference (CCC) meeting held on May 29, 2008.

**10. Issue #5:**

**Did the School fail to timely identify the Student as a Student with a disability in October 2007, or at any time subsequent to this date?**

**Answer: No**

The descriptor “timely” only has meaning when the term is interpreted to mean “within timelines prescribed by statute.” A public agency may not identify any student as a student with a disability without first completing an initial educational evaluation. Accordingly, state statute in effect at the time (511 IAC Rules 17-32), prescribed that a public agency could not begin to conduct an initial educational evaluation without a written request for such an evaluation, signed by the

parent(s), and submitted to certified personnel. This written request also required written parental consent for an evaluation to be conducted. Once such written consent was received, the School was provided sixty (60) instructional days to complete an educational evaluation. The Parents provided written consent for an evaluation to the School on January 24, 2008. The school completed its' evaluation on April 29, 2008, and made its' findings and recommendations known to the Student at the CCC meeting on April 30, 2008. The CCC meeting of April 30, 2008, resulted in a CCC Summary Report which a) identified the Student as a student with a disability (traumatic brain injury and communication disability) and b) proposed an array of special education and related services be provided the Student. The School completed an initial evaluation within the sixty (60) instructional day time period.

As such, the School did not fail to timely identify the Student as a Student with a disability in October 2007, or at any time subsequent to this date.

**11. Issue #6:**

**Has the School provided the Student with appropriate special education or related services since October, 2007?**

**Answer: Yes**

The School did not provide the Student with special education and related services between October, 2007, and May 5, 2008, nor was it compelled to do so by statute. Once services were initiated beginning on May 5, 2008, the question became, were the special education or related services provided by the School appropriate to meet the needs of the Student?

First, the services provided by the School were negotiated with the Parents at two CCC meetings: April 30, 2008, and May 29, 2008. The first of these two CCC meetings culminated when the School proposed to provide the Student an array of services, both educational services and related services, which were then agreed to by the Parents. All information provided the School by the Parents and their by private service providers was considered at both CCC meetings. The May 29, 2008, CCC ended when the parents unilaterally withdrew from the CCC meeting as a result of the School failing to agree to provide a full-day kindergarten program for the Student. While it is regretful that every child in the state of Indiana does not have available to them a full-day kindergarten program, statute does not require Indiana's schools to provide such.

The Individuals with Disabilities Education Act (IDEA), and subsequent reauthorizations, mandate that all students with disabilities receive a free and appropriate education in the least restrictive environment. Meaningful parental participation is also required along with the provision of due process. While Parents of any student declared eligible for special education services under Article 7 have an undeniable right to be active participants in the development and delivery of services to their student, these same parents do not have the right to unilaterally demand the type, duration, or frequency of services to be provided their child. Such decisions are the responsibility of the CCC, of which the parents of any student with a disability are, should be, and in this case, were active participants in all aspects of the development and delivery of special education services to be delivered to their child.

To their credit, the Parents took full advantage of their right and responsibility to be a part of the development and provision of an appropriate education for the Student. The School considered input provided by the Parents at each of the CCC meetings and incorporated multiple requests

from the Parents into the design of the Student's IEP and delivery of both special education and related services.

An IEP is considered the key element in assuring student's with a disability receive a FAPE. Neither the Act, nor Indiana's Article intends that any student with a disability receive the best, or ultimate, education possible. Neither did the IDEA or Article 7 mandate that public schools provide a student with every service proposed by either a student's parents or their private providers. A private provider, to include a neuropsychologist, cannot dictate the contents of an IEP for a student with a disability. Neither can a student's parents. The IEP is determined through the CCC process. It is the schools responsibility, through the CCC process, to ensure that every child with a disability receives an IEP that is tailored to meet the child's unique needs in a way reasonably calculated to enable the child to receive educational benefit while being educated with their non-disabled peers to the maximum extent appropriate. The Student has received an array of special education and related services in the least restrictive environment and the School's proposed IEP contains additional such services, and the services provided were reflective of the Students needs.

The Student alleged experiencing a lack of progress in some areas and regression in others which were a direct result of services provided, or failed to have been provided by the School. There is no reliable data to support the contention that the Student demonstrated a lack of progress or regression resulting from the services the School provided, or failed to provide. Young children, with or without disabilities, do not demonstrate a totally consistent progression of development, especially when measured over a short period of time. Variances in development are common for all children.

The Parents allege that the Student's behavior is different in the home setting than the behavior observed in the school setting, and further, that this variance in behavior is a result of inappropriate services, or lack of services, provided by the School. It is consistent with the science of behavior that all individuals display different behavior in different settings. Individuals, along with the actual environment itself, serve as discriminative stimuli. Different settings, for a multiplicity or reasons, serve to occasion different behaviors in individuals, especially young children. The Student failed to demonstrate that any variances in behavior between the school and home environments, as reported by the Parents, resulted from the programs provided, or failed to have been provided, by the School. Additionally, schools cannot be held individually responsible for a students lack of generalization of skills or behavior taught in one environment (the school) and those displayed in another environment (the home) for a multiplicity of reasons.

As such, the School has provided the Student with appropriate special education or related services since October, 2007.

#### **12. Issue #7:**

**As a result of any failure of the School to provide the Student any required special education or related services, is the Student entitled to compensatory services, and if so, what compensatory services?**

#### **Answer: No**

The services provided by the School, to date, were reasonably calculated to provide the Student with meaningful benefit, and the Student received reasonable benefit from these services. No

reliable, convincing data to the contrary was presented. Were the services provided by the School the best possible services that may have been designed for this Student? No. Were the services provided to the Student provided at the earliest opportunity possible? No. It is regretful that services were not provided to the Student prior to May 5, 2008, especially when one considers that the School's decision to provide services, and the extent of services to be provided, was based primarily on information obtained from the Parents and their private providers. This is especially meaningful when one considers that such information was available to the School weeks prior to the actual determination of eligibility and the resulting initiation of services. Who was responsible for the delay of services? Unfortunately, both parties share some of the responsibility. However, the School did provide special education and related services within timelines established by statute.

The Student was classified as having a mild to moderate traumatic brain injury. The injury is not severe. A preponderance of the data suggest the Student demonstrated progress in most, if not all areas. Significant recovery from the Student's injury approximating pre-injury status has been documented in some areas. Additionally, the Student is expected to continue demonstrating such progress into the future given appropriate services.

As such, the Student is not entitled to compensatory services as a result of any failure of the School to provide the Student any required special education or related services.

**13. Issue #8:**

**Did the School fail to provide the Student's parents a copy of the individualized education plan (IEP) developed at the May 29, 2008, CCC meeting within ten (10) days?**

**Answer: Yes**

The School developed a proposed IEP prior to the May 29, 2008, CCC meeting and presented the same to the Parents at that meeting. The Parents unilaterally rejected the proposed IEP, and subsequent to successfully negotiating for several modifications to the School's proposed IEP, voluntarily left the CCC meeting over the pleadings of the remaining CCC members to continue discussions, choosing to proceed with other avenues on their own regarding their demand that the School provide the Student a full-time kindergarten placement for the fall 2008 academic semester. As such, there was no finalized IEP to provide to the Parents. However, the Parents had, without the knowledge of the School, made an audio recording of the April 30, 2008, and May 29, 2008, CCC meetings, and were subsequently provided a written copy of the School's proposed amendments to the IEP developed at the April 30, 2008, CCC meeting. The Schools failure to provide the Student with a written copy of these amendments, now constituting a revised IEP, within ten (10) days of the CCC meeting of May 29, 2008, is determined to be a procedural error, and did not result in substantive harm to the Student.

As such, while the School did fail to provide the Student's parents a copy of the individualized education plan (IEP) developed at the May 29, 2008, CCC meeting within ten (10) days this failure did not result in the Student being harmed by such oversight.

**14. Issue #9:**

**Did the School fail to provide the Student with prior written notice of the School's denial to timely evaluate the Student?**



**Answer: No**

As cited in Issue #5 above, the descriptor “timely” only has meaning when the term is interpreted to mean “within timelines prescribed by statute.” The School received written permission to conduct an educational evaluation from the Parents on January 24, 2008, and completed its evaluation within sixty (60) instructional days from the date written permission was received.

As such, the School did not fail to provide the Student with prior written notice of the School’s denial to timely evaluate the Student.

**15. Issue #10:**

**Did the School fail to provide the Student with prior written notice of the School’s denial to timely determine the Student to be eligible for Special education services?**

**Answer: No**

As cited in Issues 5 and 9 above, the descriptor “timely” only has meaning when the term is interpreted to mean “within timelines prescribed by statute.” The Student was provided a copy of the School’s *Notice of Rights* in December, 2007. Contained within this *Notice of Rights* was a timeline by which the School must conduct an assessment of any student referred for special education services and subsequently determine eligibility for services of the Student. The Parent’s were provided an opportunity to inquire regarding clarification of any rights in December, 2008, and were provided a contact name and phone number of a district representative knowledgeable of the special education process for future inquiry. The Parents did not provide the School written permission to conduct an educational evaluation until January 24, 2008. The School held a CCC meeting subsequent to completion of this educational evaluation and determined the Student to be eligible for special education services on April 29, 2008. Schools cannot begin to provide special education and related services until an individual educational evaluation has been completed and the CCC has addressed the issue of eligibility. At no time, subsequent to completion of an educational evaluation, did the School deny services to the Student. As mentioned previously, while it is regrettable that the School did not expedite an educational assessment and determine eligibility for this Student in a more “timely” manner, its procedures and timelines for determining eligibility were within those established by statute.

As such, the School did not fail to provide the Student prior written notice of the School’s denial to timely determine the Student to be eligible for special education services.

**16. Issue #11:**

**Did the School fail to provide the Student with prior written notice of the School’s denial to timely determine the Student to be eligible for related services, including speech therapy?**

**Answer: No**

As cited in Issues 5, 9, and 10, above, the descriptor “timely” only has meaning when the term is interpreted to mean “within timelines prescribed by statute.” The Student was provided a copy of the School’s *Notice of Rights* in December, 2007. Contained within this *Notice of Rights* was a timeline by which the School must conduct an assessment of a student referred for special education services and subsequently determine eligibility for services for the referred student. Parents acknowledged receipt of the *Notice of Rights* document and were provided an opportunity to inquire regarding any of their rights should clarification be sought in December, 2007. Additionally, the Parents were provided a contact name and phone number of a district

representative knowledgeable of the special education process for future inquiry. The Parents did not provide the School with a written request for an educational evaluation until January 24, 2008. Schools cannot begin to provide special education and related services until an individual educational evaluation has been completed and the CCC has addressed the issue of eligibility. The School's CCC, subsequent to completion of its' educational evaluation, determined the Student to be eligible for special education and a variety of related services at a CCC meeting held April 30, 2008, which was within established timelines. At no time, subsequent to completion of an educational evaluation, did the School deny the Student eligibility for related services. As mentioned previously, while it is regrettable that the School did not expedite the educational assessment and determine eligibility and begin to provide educational and related services for this Student in a more "timely" manner, determination of eligibility and the provision of related services occurred within the timelines established by statute.

As such, the School did not fail to provide the Student with prior written notice of the School's denial to timely determine the Student to be eligible for related services, including speech therapy.

**17. Issue #12:**

**Did the School fail to provide the Student with prior notice of the School's denial to timely determine the Student to be eligible for extended school-year (ESY) services?**

**Answer: No**

As cited in Issues 5, 9, 10 and 11, above, the descriptor "timely" only has meaning when the term is interpreted to mean "within timelines prescribed by statute." The School determined the Student to be eligible for ESY services at the April 29, 2008, CCC meeting. ESY services are provided to students with disabilities beyond the normal school year, in accordance with the student's individualized education program, and at no cost to the parents. [511 IAC 7-17-35 (A-C); 511 IAC 7-32-39 (A-C)] The School determined the Student to be eligible for ESY services at the April 29, 2008, CCC meeting. There was no subsequent denial of the Student's eligibility to receive ESY services at the May 30, 2008, CCC, but rather an affirmation of the ESY services articulated in the April 30, 2008, document.

As such, the School did not fail to provide the Student with prior notice of the School's denial to determine the Student to be eligible for ESY services.

**18. Issue 13:**

**Due to the actions or inactions of the School, are the Student's parents entitled to reimbursement for the cost of private ESY services for the summer of 2008?**

**Answer: No**

The School did provide ESY services to the Student in accordance with the Student's IEP, as agreed to by the Parents at the April 30, 2008, CCC meeting. Subsequent to the Parents unilateral withdrawal from the May 29, 2008, CCC meeting, citing differences regarding the School's proposed kindergarten services which were to begin in the fall semester of 2008, the matter of ESY services beyond those previously agreed to were suspended. The School proposed a subsequent CCC meeting for the purpose of addressing multiple matters, one of which was to discuss any service(s) the School had proposed that the Parents disagreed with or to which they objected. The Parents subsequently informed the School in writing that they would not attend any

further CCC meetings. No data were introduced to establish that the Student did not receive benefit from the ESY services provided by the School.

As such, due to the actions or inactions of the School, the Student's parents are not entitled to reimbursement for the cost of private ESY services for the summer of 2008.

**19. Issue #14:**

**Did the School fail to provide the Student with prior written notice of denial to determine the Student to be eligible for a full-day kindergarten program?**

**Answer: Yes**

The requirements of prior written notice are enumerated in 511 IAC 7-22-2 (state statute in effect at the time at which this issue was raised). According to statute, the public agency is required to provide prior written notice to the Parents a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or special education placement of the Student or the provision of a free appropriate public education, or refuses to initiate or change the identification, evaluation, or special education placement of the Student or the provision of a free appropriate public education to the Student.

Decisions regarding services to be provided any student with a disability are made as a result of a CCC process. In this particular instance, the Parents were notified in writing of the dates, times and places of both the April 30, 2008, and May 29, 2008, CCC meetings, along with the proposed content of these CCC meetings. Included was a listing of anticipated participants, and the role of each anticipated participant. The Parents were provided such advance notification which subsequently allowed the Parent's to fully participate in each of these CCC meetings. The School recommended a "kindergarten" program for the 2008-2009 school year at the April 30, 2008, CCC meeting. Contained within the written notification of the May 29, 2008, CCC meeting was an entry that stated a transition to kindergarten would be discussed. Thus, it is well established that the issue of a kindergarten, as provided by the School, versus a full-day kindergarten program as requested by the Parents, was discussed at the April 30, 2008, CCC meeting.

A regular half-day kindergarten program was the School's proposed educational placement for the Student for the 2008-2009 school year and was specifically discussed in depth at the May 29, 2008, CCC meeting. Prior notification of the School's proposal regarding the provision of kindergarten services was provided the Parents at the May 29, 2008 CCC meeting. However, such notice was not provided in writing. The CCC determined, with the Parents in attendance and actively participating in the CCC process, that the needs of the Student a) did not warrant a full-day educational placement for the 2008-2009 school year and b) that the School did not provide any student with a full-day kindergarten program. In that the Parents withdrew from the May 29, 2008, CCC meeting prior to an IEP being completed, the School did not provide the Parents with written notification of the School's denial to provide the Student a full day kindergarten program within ten (10) instructional days following the CCC meeting. However, the School's position was quite clear regarding kindergarten services. The Parents were subsequently provided written notice of the School's decision regarding a full-day kindergarten program.

The School's failure to provide prior written notice of the Schools denial to determine the Student to be eligible for a full-day kindergarten program is deemed to have been procedural in nature and in no way resulted in harm to the Student.

**20. Issue 15:**

**Has the School failed to devise an appropriate IEP for the Student?**

**Answer: No**

A CCC meeting was conducted on April 30, 2008, at which time an IEP was developed. This IEP stipulated that numerous services were to be provided, beginning on May 5, 2008, and continuing until May 5, 2009. Services included ESY services and extended day services in conjunction with a regular kindergarten program, being half-day in duration. On May 29, 2008, the CCC again met and reviewed information and decisions resulting from the April 30, 2008, CCC meeting along with additional data as generated by the School or provided by the Parents. Reports of the Student's progress in multiple areas were provided. The IEP developed at the April 30, 2008, CCC meeting was revised. Adjustments to proposed services were made on the basis of Parental input. According to testimony and the audio recording of the May 29, 2008, CCC meeting, stipulated by both parties to be an accurate recording, that while there was some disagreement between the parties regarding services to be provided, or the frequency of duration of such services for the fall 2008 semester, the overriding disagreement centered on a half-day versus a full-day kindergarten program. The School proposed the Student be served in the School's half-day regular kindergarten program with some additional related services being provided beyond the regular kindergarten day. Subsequent to the Parents choosing to leave the CCC meeting prior to completion of an amended IEP, the CCC did not formally complete and publish a revised IEP. Instead, the School terminated the IEP writing process at the time the Parents chose to leave the CCC meeting. However, failure to formally complete and publish a revised IEP for the 2008-2009 school-year within the timelines established by statute, including clearly specifying a proposed educational placement for the Student, is a procedural violation of Article 7 and the IDEA. However, the services listed on the amended CCC report from the April 30, 2008, was viewed as the Student's then current IEP and was reviewed and modified at the May 30, 2008, CCC meeting. The IEP as composed at the April 30, 2008, and subsequently modified at the May 29, 2008, CCC was tailored to meet the Students educational needs and was reasonably calculated to provide the Student educational benefit.

As such, the School has not failed to devise an appropriate IEP for the Student.

Based on the foregoing, the IHO issued the following orders:

**ORDERS**

1. The Student shall attend the School's regularly scheduled one-half day kindergarten program during the 2008-2009 academic school year.
2. The School will publish a typed, clean copy of the Student's IEP as proposed and modified at the May 29, 2008, CCC meeting and make such copy available to the Student within ten (10) instructional days from the date of this order.
3. The School will provide all educational and related services as specified in the IEP as modified at the May 29, 2008, CCC meeting during the 2008-2009 school-year unless the provision of such services are modified through the case conference process and agreed to by both parties and recorded in a revised IEP.

## APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

On November 3, 2008, counsel for the Student requested an extension of thirty (30) days in which to file a petition for review. By order of November 5, 2008, the Board of Special Education Appeals (BSEA) granted the Student's request such that the Student's petition for review was to be filed by the close of business on December 10, 2008. The timelines for review and issuance of the BSEA's written decision was similarly extended until January 9, 2009. The Student timely filed his Petition for Review on December 10, 2008. On December 11, 2008, the School requested an extension of time to prepare and file its Response to the Petition for Review. The BSEA issued an Order on December 12, 2008, granting the School's request for an extension of time, giving the School an extension of time to and including January 12, 2009, to file its Response. The timeline for the BSEA's review and issuance of a written decision was extended until February 11, 2009.

The record from the hearing below was copied and transferred to the BSEA members on December 23, 2008.

The School filed its Response on January 12, 2009.

On December 10, the Office Manager, Legal Affairs, Department of Education, contacted the parties to obtain available dates should the BSEA elect to hold oral argument. The Parents were also requested to indicate how they wished to receive the final written decision of the BSEA and whether they wish to have oral argument opened or closed to the public. The parties responded timely, indicating available dates.

On January 21, 2009, the BSEA notified the parties that it would conduct its review without oral argument and without the presence of the parties on February 4, 2009, in the offices of the Indiana Department of Education, 151 W. Ohio Street, Indianapolis, IN.

The BSEA conducted its review on February 4, 2009. All three members of the BSEA were present.

### ***Student's Petition for Review***

The Student's Petition for Review raises the following issues:

1. Whether the IHO erred in concluding that all required participants were present at the case conference committee (CCC) meetings on April 30, 2008, and May 29, 2008.
2. Whether the IHO has incorrectly stated Issue 1 of this matter, and thus failed to reach a conclusion on the actual question raised by the parents in HR 270-2008.
3. Whether the IHO based his decision on information and materials which were not presented as evidence at the hearing, and therefore not properly before the IHO.
4. Whether the School knew and had notice of the Student's disabilities as early as November 2007 and failed to undertake the affirmative "child-find" obligations contained in IDEA and Article 7.
5. Whether the IHO erred in limiting consideration of evidence regarding events subsequent to the CCC meetings.

6. Whether the failure to provide (1) prior written notice of the denial of full-day kindergarten, (2) the May 29, 2008, individualized education program (IEP) and (3) student progress reports to the parents resulted in a denial of a free appropriate public education (FAPE) for the Student.

The Student argues that no person with authority to decide whether the Student could attend full-day kindergarten was present at either CCC meeting. Additionally, no kindergarten teacher was present at either CCC meeting. Secondly, the IHO incorrectly stated the first issue as “Does the Student require a full-time summer program in order to receive FAPE?” The correct statement of the issue was “Does the Student require a full-time school program in order to receive FAPE?” Because the IHO misstated the issue, he decided the wrong issue and failed to address the issue raised by the Student. Third, the Student claims the IHO conducted some personal research concerning the NEPSY which was not introduced as evidence at the hearing, thereby exceeding his jurisdiction. Findings of Fact Nos. 65 – 67 are not supported by evidence of record.

The School was advised of the Student’s disability in November and December, 2007. The School used the parents’ delay in returning a signed consent form on January 24, 2008, as justification for waiting until April 30, 2008, to determine the Student’s eligibility for special education services. The IHO exceeded his jurisdiction and acted contrary to the purpose of the IDEA when he limited evidence of events subsequent to the CCC meetings. The limited evidence included the July NEPSY which demonstrated the Student’s regression, as well as medical testimony that the Student needed full-day kindergarten and an FM audio system in order to receive a FAPE.

Finally, the Student argues that the School’s failure to provide prior written notice of the School’s denial of full-day kindergarten and its failure to provide progress reports and a copy of the May 29, 2008, IEP were not harmless errors. They were procedural violations which rose to the level of denial of a FAPE.

### ***School’s Response to Petition for Review***

The School maintains the IHO’s decision is not arbitrary or capricious, is supported by substantial evidence, does not exceed the IHO’s authority, and is in accordance with federal and state law. The BSEA should uphold the IHO’s decision as the Student failed to establish that the School was not offering a FAPE and the Student presented absolutely no evidence that the private services the parents obtained were appropriate.

The School timely evaluated the Student, and designed and implemented an appropriate program and placement for the Student. The Student’s parents agreed with the determinations of the CCC which demonstrates the program provided a FAPE. Progress has been demonstrated under the School’s program.

The IHO’s conclusions of law should be affirmed because they are supported by substantial evidence in the record and are in accordance with applicable law, they are not beyond the IHO’s authority, and are neither arbitrary nor capricious. The IHO correctly determined the Student was provided a FAPE. The IHO’s findings concerning the NEPSY are supported by evidence in the record. The IHO is a professor at Indiana State University’s School of Education. There was

extensive discussion at the hearing concerning the disclosure of the testing protocols and other documents by Dr. Hudson.

The IHO did not err in determining the School appropriately evaluated and identified the Student as eligible for special education services. The parents did not return the completed referral for evaluation until January 24, 2009. 511 IAC 7-25-4 provides that the School must complete the evaluation and convene the CCC meeting within sixty (60) instructional days. The IHO did not err in his rulings concerning the admissibility of evidence concerning events subsequent to the CCC meetings. The appropriateness of the IEP must be determined at the time it is formulated.

The IHO did not err in determining the School provided reports to the Student. Even if there was a failure, procedural defects do not amount to a denial of a FAPE unless they also significantly impede the parent's opportunity to participate in decision-making regarding the provision of a FAPE; impede the Student's rights to a FAPE; or cause a deprivation of educational benefits to the Student. 20 U.S.C. § 1415(f)(3)(E)(ii).

### **REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS**

On April 30, 2007, the BSEA convened in Indianapolis for the purpose of conducting oral argument and its review in this matter. All three members appeared. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto, the BSEA now decides as follows.

### **COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-45-9(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-45-7. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-45-9(j). The Student timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-45-9.
2. Article 7<sup>7</sup> hearings are conducted pursuant to the Indiana Administrative Orders and Procedures Act<sup>8</sup> and 511 IAC 7-45-7.

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<sup>7</sup> 511 IAC 7.

<sup>8</sup> I.C. 4-21.5-3.

3. The IHO's decision must contain separately stated findings of fact, conclusions of law,<sup>9</sup> and, if applicable, orders. The conclusions of law must be based upon the findings of fact and the orders must be derived from the conclusions of law.
4. A petition for review of a due process hearing must be specific as to the reasons for the exceptions to the IHO's decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken. 511 IAC 7-45-9(d)(4).
5. The Student has identified three findings of fact to which exception are taken, arguing that Findings of Fact 65-67 are not based upon evidence in the record. These findings do appear to be based upon documents that are not in evidence. An IHO's findings must be based exclusively upon the evidence of record and on matters officially noticed. The IHO's experience, technical competence, and specialized knowledge may be used in evaluating the evidence. I.C. 4-21.5-3-27.
6. Official notice may be taken of the following: (1) Any fact that could be judicially noticed in the courts. (2) The record of other proceedings before the agency. (3) Technical or scientific matters within the agency's specialized knowledge. (4) Codes or standards that have been adopted by an agency of the United States or this state. I.C. 4-21.5-3-26(f). Judicial notice may be taken of facts not subject to reasonable dispute, and laws. Indiana Rules of Evidence (REV), Rule 201(a).
7. The parties must be notified before or during the hearing, or before the issuance of any order that is based in whole or in part on facts or material noticed, and the source of the facts or material noticed, and afforded an opportunity to contest and rebut the facts or material noticed. I.C. 4-21.5-3-26. There is no indication in the record that the parties were notified of the IHO's intent to rely upon facts or material outside the record. Findings of Fact 65 – 67 are struck. Because the conclusions of law and orders are not based upon these findings, the error was harmless.
8. No objections were raised as to any other findings of fact. The IHO's Findings of Fact 1 – 64 and 68 – 160 are upheld as written.
9. In his August 2, 2008, order, the IHO granted the Student's request for a revision of the issues. Pursuant to that order, the first issue was identified as "Does the Student require a full-time school program in order to receive FAPE?"
10. The IHO's findings of fact and conclusions of law support the conclusion that the Student does not require a full-time school program in order to receive FAPE. The statement of the issue in Conclusion of Law No. 6 is restated as "Does the Student require a full-time school program in order to receive FAPE?" The last paragraph of Conclusion of Law No. 6 is modified as follows: As such, the Student did not require a full-time summer school program nor does the Student require a full-time kindergarten program.

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<sup>9</sup> **Error! Main Document Only.** The Administrative Orders and Procedures Act uses the terminology "findings of ultimate fact."



11. 511 IAC 7-27-3(a)(1—4) specified the participants for a case conference committee. Although the School did have an agency representative at the May 29, 2008, case conference committee meeting, a general education teacher was not present. Conclusion of Law No. 9 is modified as follows:

**Were all required participants in attendance at a Case Conference Committee (CCC) meeting held on May 29, 2008?**

**Answer: No**

Article 7 requires the following to be in attendance at meeting of the CCC with noted exceptions. Required attendees include:

“(1) A representative of the public agency, other than the student’s special education teacher, who has the following qualifications:

(A) Is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of students with disabilities.

(B) Is knowledgeable about the general education curriculum.

(C) Is knowledgeable about the availability or resources of the public agency.

(2) The student’s current teacher of record...

(3) One (1) of the student’s general education teachers, if the student is or may be participating in the general education environment.

(4) The parent of a student less than eighteen (18) years of age...” [511-IAC 7-27-3 (a)(1-4)]

The record of attendees at the CCC meeting indicated the presence of an agency representative and the Student’s teacher of record. The record did not indicate the attendance of a general education teacher for the student as the CCC planned for his transition to kindergarten. As such, all required participants were not in attendance at a case conference (CCC) meeting held on May 29, 2008.

The Student has not shown that this procedural violation impeded the Student’s right to a free appropriate public education; significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the Student; or caused a deprivation of educational benefits. As such, there was not a denial of a FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii).

12. The School did not fail to meet its child-find obligations.

13. The IHO did not err in his consideration of the evidence.

14. The Student has not shown that any procedural violation impeded the Student’s right to a free appropriate public education; significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the Student; or caused a deprivation of educational benefits. As such, there was not a denial of a FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii).

## **ORDERS**

In consideration of the foregoing, the Board of Special Education Appeals rules as follows:

1. Except as modified in Combined Findings of Fact and Conclusion of Law Nos. 7, 10, and 11, the IHO's Findings of Fact, Conclusions of Law, and Orders are upheld as written.
2. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: February 10, 2009

/s/Rolf W. Daniel  
Rolf W. Daniel, Ph.D., chair  
Board of Special Education Appeals

## **APPEAL RIGHT**

Any party aggrieved by the decision of the Board of Special Education Appeals has the right to seek judicial review in a civil court with jurisdiction within thirty (30) calendar days from receipt of this written decision, as provided by I.C. 4- 21.5-5-5 and 511 IAC 7-45-9(n).